

SAFETEA-LU Transportation Improvements

Implementing Guidance (February 2006)

BACKGROUND

Section 1934 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU, Public Law 109-59, 119 Stat.1144) authorized funds to be appropriated from the Highway Trust Fund (HTF) to carry out each project described in this section. The purpose of this guidance is to provide information on funding, Federal share, eligibility, flexibility, and transferability of SAFETEA-LU Transportation Improvements (TI) projects.

I. GENERAL

A. Authorization of Appropriations

Section 1934 of SAFETEA-LU authorizes funds to be appropriated from the HTF for each fiscal year (FY) from 2005 through 2009 to carry out the 466 projects described in subsection (c). The sum of the amounts specified for the TI projects is \$2,555,236,000.

B. Funding

1. Allocations

Of the total amounts specified for each Transportation Improvements Project described in the table contained in subsection (b) of section 1934 of SAFETEA-LU, the funds shall be allocated to carry out each project as follows:

- (1) 10 percent for fiscal year 2005;
- (2) 20 percent for fiscal year 2006;
- (3) 25 percent for fiscal year 2007;
- (4) 25 percent for fiscal year 2008;
- (5) 20 percent for fiscal year 2009.

In addition, 23 U.S.C. §110, Revenue Aligned Budget Authority, as amended by section 1105 of SAFETEA-LU, provides that the authorized amounts of Federal-aid highway and highway safety construction programs be increased or decreased beginning in FY 2007 in accordance with the increase or decrease in estimated revenue to the HTF.

2. Funding for Transportation Improvements Projects

The Fiscal Management Information System (FMIS) program code for the funds for TI projects is LY30 for FYs 2005 through 2009, and the DELPHI accounting string is 15X0R71H50-050LY30500. The contract authority (CA) for these projects is authorized by project, but the obligation authority (OA) is provided each year in the aggregate for each State under the provisions of 1102(c) subsection (4)(A) of SAFETEA-LU and 110(a)(4)(A) of the Transportation, Treasury, Housing and Urban Development, the Judiciary, and Independent Agencies Appropriations Act, 2006 (Public Law 109-115). Thus, it is the State's decision on which TI projects the OA is used. This is consistent with 23 U.S.C. §145.

For TI funds that are transferred to the Federal Lands Highway Program (FLH), program codes will be issued upon request.

C. Obligation Authority (OA)

General

The special OA provided for the TI projects is only available for these TI projects although some project flexibility is allowed as described in section 1935 of SAFETEA-LU. Please refer to the Flexibility Provisions discussion in this document for additional information pertaining to project flexibility for these projects.

Additionally, this special OA is available until used and is distributed by State and the State has the discretion to select which projects to carry out under the special OA.

Since this special OA is usually less than 100 percent of the allocated amounts, due to the imposition of obligation limitation on the Federal-aid highway program, States may use their regular OA (or formula OA) to fully obligate the allocated contract authority funds for TI projects. To use regular OA (or formula OA), the contract authority funds must be transferred from the program code assigned to the project to program code L900 in order to differentiate regular OA from special OA.

For these transfers, the State should submit requests, to the FHWA Division Office. The Division Office will then submit the request via e-mail to the Finance Division (HCF-20) of the Office of the Chief Financial Officer. The Finance Division will process the transfer of OA in FMIS and will send a confirmation e-mail to the FHWA Division Office when the transaction has been completed.

D. Federal Share

1. General

The Federal share for TI projects is determined by 23 U.S.C. §120 unless otherwise specified within the project description or in law. The match must come from non-Federal sources, unless the source of Federal funds has specific legislative authority that allows the match to be other Federal funds, including Federal-aid highway funds.

2. Federal Share Exceptions

TI 377 - Whether or not otherwise eligible in title 23, construct Phase II and III of Phillips to the Falls Project. Notwithstanding any other provision of law, with respect to costs for Phase II and III of this project paid for from this \$40 million, the Federal share of project costs shall be 100 percent.

Section 1913 of SAFETEA-LU- Bridge Construction, North Dakota provides that the Federal share of the eligible costs of construction of a bridge between Bismarck, North Dakota and Mandan, North Dakota shall be 90 percent. This applies to TI project 266.

Section 1964 of SAFETEA-LU - Project Federal Share provides that the Federal share for projects listed in sections 1702, 1301 and 1934 for Alaska, Montana, Nevada, North Dakota, Oregon and South Dakota be determined by section 120(b) of title 23, U.S.C. This means that these States can utilize the sliding scale provisions under 23 U.S.C. §120(b) when determining the Federal share for section 1934 TI projects.

3. Eligible Donations and Credits

In accordance with 23 U.S.C. §323, as amended by section 1902 of SAFETEA-LU, private donations of right-of-way, funds, materials, or services may be used toward the non-Federal share on any eligible title 23, U.S.C. project. Also, local government donations of right-of-way, funds, materials, or services performed by local government employees may be used toward the non-Federal share on any eligible title 23, U.S.C. project.

Any right-of-way donated at any time during the development of a project in accordance with the requirements of 23 U.S.C. §323, may be applied to the matching share. But costs, including eligible donated services and materials, incurred prior to FHWA authorization of the project, cannot be applied to the non-Federal matching share of the project.

4. Toll Credits

Under the provisions of 23 U.S.C. §120(j), as amended by sections 1116 and 1905 of SAFETEA-LU, toll credits may be used toward the 20 percent non-federal matching share for programs authorized by title 23, U.S.C. and for transit programs authorized by chapter 53 of title 49, U.S.C. with the exception of the Emergency Relief and the Appalachian Development Highway System programs. Toll credits can be applied at any time during the development and implementation of the project, including after execution of the initial project agreement. A State may use amounts of approved toll credits to cover all or a portion of the non-Federal share of the project which could result in up to 100 percent of the cost being borne by Federal funds on the project (with the State meeting its matching share requirement by providing a non-cash credit). To be able to earn toll credits to apply toward the non-Federal share of a project, the State must satisfy the Maintenance of Effort determination and other provisions set forth in 23 U.S.C. §120(j). Please refer to the Implementing Guidance for the Toll Credit program for further details.

5. Use of Federal Lands Management Agency (FLMA) Funds

Under the provisions of 23 U.S.C. §120(k), as amended by section 1119 of SAFETEA-LU, any funds appropriated to a FLMA, such as the National Park Service, the Forest Service, etc., may be used to provide the non-Federal matching share for any project funded under title 23 or chapter 53 of title 49, U.S.C.

6. Use of Federal Lands Highway Program (FLHP) Funds

Under the provisions of 23 U.S.C. §120(l), as amended by section 1119 of SAFETEA-LU, any funds appropriated for the FLHP under 23 U.S.C. §204 may be used to provide the non-Federal share for any project under title 23 or chapter 53 of Title 49, U.S.C., as long as the project is providing access to or within Federal or Indian lands. This includes funding provided for the public lands highways, park roads and parkways, and Indian reservation roads and bridges programs.

E. Period of Availability

In accordance with section 1934 of SAFETEA-LU, TI funds shall be available until expended. The special OA is also available until used.

II. FLEXIBILITY PROVISIONS

A. Advance Construction

Under the provisions of 23 U.S.C. §115, as amended in section 1501 of SAFETEA-LU, a State may construct a TI project without the aid of Federal funds and be reimbursed with the Federal TI funds as they become available. The authorization of an advance construction for a TI project does not constitute a commitment of Federal funds until the project is converted to a regular Federal-aid project. This option can be selected by checking the Advance Construction box in FMIS. For assistance with this feature of FMIS, please contact Joy Kelly (202-366-2922) of the FMIS Team.

B. Project Flexibility - Section 1935

Under the provisions of section 1935 of SAFETEA-LU, the funds allocated for a project specified below (CA as well as the associated OA) may be temporarily “moved” to any other of these projects in the same State:

- (1) Projects numbered 3677 through 5173 in section 1702;
- (2) Projects numbered 19 through 25 in section 1301;
- (3) Projects numbered 28 through 33 in section 1302;
- (4) All of the projects listed in section 1934.

except that the authorization for a project from the category list may not ultimately be reduced.

Any CA moved in this manner shall be restored, to the original project(s) from which it originated, before the end of FY 2009. Any OA moved in this manner will automatically be restored, to the original project(s) from which it originated, in the following fiscal year. The State will be required to resubmit requests to have the OA moved back to the project(s) that needed the additional OA. This action is being required annually because of the difficulty in tracking and reconciling funds that have been moved across programs.

Also, any request for CA and OA that has not yet been allocated will be limited to 85 percent of the authorized amount, in order to conservatively account for future situations such as obligation limitations, rescissions, etc.

States that choose to move CA (and OA associated with the CA) between sections and projects in the same state, as described in the list above, should submit requests to the FHWA Division Office. The Division Office will then submit the request via e-mail to the Finance Division (HCF-20) of the Office of the Chief Financial Officer. The Finance Division will process the request to move CA and OA in FMIS and will send a confirmation via e-mail to the FHWA Division Office when the transaction has been completed.

C. Advances - Section 1936

Under the provisions of section 1936 of SAFETEA-LU, funds apportioned under 23 U.S.C. §104(b) may be obligated to carry out a project listed in section 1934 of SAFETEA-LU. The project must be eligible under the program from which the funds are obligated. Any apportioned funds used in this manner shall be restored from the TI funds allocated for the project.

Please note that this provision does not allow the deobligation of apportioned funds, and the reobligation of TI funds for costs incurred on a project prior to August 10, 2005, the date SAFETEA-LU was enacted, with the exception of the following conditions:

- (1) Enactment of legislation that specifically designates reimbursement of previously incurred cost;
- (2) The project was previously authorized under 23 U.S.C. §115, Advance Construction;
- (3) The TI funds for a project would otherwise not be able to be fully utilized on the TI project because of prior obligation of apportioned funds, thus preventing the ability to fulfill the congressional intent of the TI project. In these instances, as a matter of agency practice, the FHWA has allowed the deobligation of apportioned funds and the reobligation with the TI funds in order to ensure that TI funds are fully obligated and expended on the TI project. The State must provide documentation to the Division Office that demonstrates that the TI funds cannot be fully utilized if it weren't for a deobligation of apportioned funds and the reobligation with the TI funds. Acceptable documentation includes information that there is not another eligible project that would satisfy the scope of work as described in the project description. Additionally, adequate documentation should be provided to that demonstrate that the deobligation of apportioned funds, and the reobligation of TI funds occurred with funding that was obligated no earlier than August 10, 2005.

Under condition 3, the Division Office will coordinate with the review and concurrence of the documentation with the Office of Program Administration and the Office of Chief Counsel.

III. ELIGIBLE WORK / PROJECT DESCRIPTIONS

The project descriptions, as shown in section 1934 of SAFETEA-LU, define the scope of work for the project on which the funds may be legally expended. Funding for a project can only be used for the activities within the scope and the physical limits as defined by the project description. Project descriptions that list recipients, not projects, will require that the recipients utilize the funds for projects that are eligible for Federal-aid funding.

If the TI project, as described in section 1934, would be eligible under one of the FHWA's regular Federal-aid programs, then it is eligible for funding with TI funds (following the eligibility rules of the applicable Federal-aid program). For example, if a project is eligible under the Transportation Enhancement Program, it must follow the eligibility rules that would apply to an enhancement project funded with Surface Transportation Program (STP) funds in order to be eligible for the TI funds. In the case of a TI that work would be otherwise eligible as a CMAQ project (including any process that must be undertaken to justify the use of CMAQ funds), then the TI project is carried out under the eligibility rules that would apply to a CMAQ project in order to be eligible for the TI funds.

If, however, the TI project, as described in section 1934, would not normally be eligible under one of FHWA's regular Federal-aid programs, then the project description in section 1934 should specifically identify those activities to be funded. In order to fund projects or activities not otherwise eligible for Federal-aid funding under title 23, U.S.C., a statutory designation of Federal-aid funds must explicitly describe the project to be funded. An explicit project description serves as statutory authority to fund the activity or project (note unlike the HPP, the TI projects is not a title 23 program) consistent with "the purpose" of the statutory designation. See 31 U.S.C. §1301(a), "the purpose" statute. Additionally, project descriptions that list a road that is not classified as a Federal-aid Highway may be treated as a Federal-aid highway for the purpose of identifying eligible activities so that the earmarked funds may be expended.

In cases where generally stated TI projects are obviously not normally eligible Federal-aid highway projects, an effort to obtain congressional intent of the project should be made by entities other than FHWA. Please note that a letter from a congressperson or their staff cannot establish congressional intent.

Unlike appropriation act provisions that contain substitution provisions that permit funding to be shifted to otherwise eligible title 23 projects, the authorization act does not provide the Secretary the discretion to shift funding to otherwise eligible title 23 projects. Thus, any changes to project descriptions have to be accomplished through legislation.

If the project analysis confirms that the project is not a highway improvement and the State DOT is not willing to oversee the project, the State DOT should consider identifying another agency to administer the project. In such cases where the project is better administered by another Federal agency, the State, upon agreement with the

Federal agency, may request to have the funds transferred for the project and reassigned to that agency under 23 U.S.C. §132. For example, a TI project having a project description of “Native American Cultural Center” does not appear to encompass highway eligible activities therefore it could be transferred to another federal agency for administration. Please refer to the “Transfer of TI funds to Other Federal Agencies” section of this document for additional details.

If a project description includes an obvious typographical or technical error, this matter should be coordinated with staff of the Office of Program Administration (HIPA-10). When there is a discrepancy between what is described in section 1934 of SAFETEA-LU and what was intended, under 31 U.S.C. §1301(a), funds may only be used on the purpose (eligible work described) of the project description. Any changes to project descriptions for these projects may only be accomplished through legislation.

The TI projects are to be administered, as any other Federal-aid highway project, in accordance with the oversight agreement required by 23 U.S.C. §106(c) between the FHWA division office and the State DOT.

IV. TRANSFER OF TI FUNDS TO OTHER FEDERAL AGENCIES

A. Transfers to the Federal Transit Administration (FTA)

Under the provisions of 23 U.S.C. §104(k)(1), as amended by section 1108 of SAFETEA-LU, funds for transit projects or transportation planning may be transferred to and administered by FTA in accordance with the provisions of chapter 53 of title 49, U.S.C. The procedures for accomplishing these transfers were established in the October 26, 1999, joint FHWA/FTA memorandum. Questions regarding these procedures should be addressed to the Finance Division of the Office of the Chief Financial Officer.

Projects transferred in this manner shall adhere to the Federal share requirements established for the projects in title 23, U.S.C. In accordance with the established procedures, the FTA will certify annually that the transferred funds are being used for the intended purpose, which, for an TI project, is the project description in section 1934 of SAFETEA-LU.

For projects that are to be transferred to FTA, the State should submit requests to the FHWA Division Office indicating the amount of CA and an equal amount of OA to be transferred. The request should include how the non-Federal share match requirement will be satisfied. The Division Office will forward the request via e-mail to the Finance Division (HCF-20) of the Office of the Chief Financial Officer, with a copy to the Office of Program Administration. The Finance Division will process the transfer of funds in FMIS and send a confirmation e-mail to the FHWA Division Office, with a copy to the Office of Program Administration, when the transaction has been completed.

B. Transfers to Other States or to Federal Highway Administration (FHWA)

Under the provision of 23 U.S.C. §104(k)(3), as amended by section 1108 of SAFETEA-LU, funds apportioned or allocated to a State under title 23, U.S.C., may be transferred to another State or to the FHWA (Office of Federal Lands Highway) for eligible projects, at the State's request. Since the TI funds are allocated under title 23, U.S.C., the TI project may also be transferred under the provisions of 23 U.S.C. §104(k).

For transfers from State to State, the State transferring the project should submit requests to the FHWA Division Office indicating the amount of CA and OA to be transferred to another State. Additionally, the State receiving the transferred CA and OA must submit a letter acknowledging the project that will utilize the funds. The Division Office will forward the request and acknowledgement, via e-mail, to the Office of Program Administration. The Office of Program Administration will assign a new Demo ID for the acknowledging State and issue a memo requesting that the Finance Division (HCF-20) of the Office of the Chief Financial Officer withdraw CA and OA from the State transferring the project and allocate the same to the State acknowledging the transfer. The Finance Division will process the transfer of CA and OA in FMIS and send an e-mail confirmation to the FHWA Division Office, with a copy to the Office of Program Administration, when the transaction has been completed.

For projects that are transferred to the FHWA to be administered by FLH, the State transferring the project should submit requests to the FHWA Division Office to have the funds and an equal amount of OA transferred to FLH. The Division Office will forward the request via e-mail to the Budget and Finance Division (HCF-20) of the Office of the Chief Financial Officer. The Finance Division will process the withdrawal of CA and OA from the State in FMIS and will send an e-mail confirmation to the Budget Division. The Budget Division will then issue allotments to FLH and send e-mail confirmation to the FHWA Division Office, with a copy to the Office of Program Administration, when the transaction has been completed.

C. Transfers to Other Federal Agencies

A Federal-aid highway project may be transferred to another Federal agency, but the project must meet the eligibility requirements of the FHWA prior to being transferred. Under the provisions of 23 U.S.C. §132, as amended by section 1119 of SAFETEA-LU, a State may enter into an agreement with a Federal agency to have a Federal-aid project "undertaken" by the Federal agency. The term "undertaken" is interpreted to mean that the Federal agency must actually administer the project or carry out an activity necessary to the project, either with its own forces or through a contract with the appropriate private company. The State may request a direct transfer of funds for the Federal share of the project to the Federal agency [23 U.S.C. §132(a)(1)] or make a deposit or payment to the Federal agency as is required under the agreement for the work to be undertaken by the Federal agency [23 U.S.C. §132(a)(1)] and be reimbursed. In cases where State Law prohibits a direct transfer to FLMA agencies, FLH will continue the practice of administering the project with the FLMA.

For non-traditional projects unrelated to highway improvements or other ineligible activities under title 23, the receiving Federal agency can administer the project in accordance with their own appropriate Federal requirements with the following exceptions:

- (1) The non-Federal share match for these funds must still come from non-Federal sources, unless the source of Federal funds has specific legislative authority that allows the match to be other Federal funds; and
- (2) Since the project description defines the scope of work on which the funds may be legally expended, the funding for the project can only be used for the activities within the scope and physical limits as defined by the project description.

In cases where the transfer is for a highway or other Federal-aid eligible activity, the project must be carried out by the receiving agency in accordance with all title 23, U.S.C. requirements. In either situation, the above information should be included in all agreements.

Under 23 U.S.C. §132, final acceptance of the project by the Secretary of Transportation is required. This final acceptance should be accomplished in accordance with the oversight agreement between the FHWA Division Office and the State under 23 U.S.C. §106(c).

This process would apply to projects that are to be administered by a Federal DOT agency other than the FTA, such as the Federal Railroad Administration or the Maritime Administration, or other Federal agencies. The State should submit requests to the FHWA Division Office to have the funds and an equal amount of OA transferred to the Federal agency, except in cases where the State will be making a deposit or payment to the Federal agency. The Division Office will then submit the request via e-mail to the Budget and Finance Division (HCF-20) of the Office of the Chief Financial Officer. The Finance Division will process the withdrawal of funds and OA from the State in FMIS and will send an e-mail confirmation to the Budget Division. The Budget Division will then issue allotments to the appropriate Federal agencies and send e-mail confirmation to the FHWA Division Office when the transaction has been completed.

The funds for these projects may only be used for the purposes specified in the project description in section 1934 of SAFETEA-LU. These funds may not be used for the Federal agency's administrative expenses and require a 20 percent match that must come from non-Federal sources. In general, it is expected that the Federal agency will administer the project in accordance with their appropriate Federal requirements.